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No. _____

In the

Supreme Court of the United States

October Term, 2006

LINDA HAYNES,

Petitioner,

v.

LEVEL 3 COMMUNICATIONS, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since this Court's decision in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), eliminating the continuing violation doctrine in most discrimination cases, said decision has been honed to razor sharpness in the circuit courts to dismiss cases contrary to the remedial nature of discrimination laws and the intent of Congress.

In doing so, certain courts of appeals have ruled that even the most petty of workplace slights requires the filing of a charge of discrimination with the EEOC or said slight cannot become the basis of a claim of discrimination more than 300 days into the future. This has led to the unintended result that an employee whose sales accounts are being slowly removed, one by one, must file an EEOC charge for each and every removed sales account or be forever barred from citing each individual removal in any future discrimination action. That is what happened in the instant case.

Moreover, certain courts of appeal -- including the instant one -- have gone one step further to rule that evidence originating more than 300 days before the current adverse employment action cannot be used for any purpose, including to prove discriminatory intent regarding a later adverse action. This is as a matter of law and amounts to a special statute of limitations for use of evidence in discrimination cases. Certain courts of appeals, including this one, have also ruled that said 301-day-old evidence is *ipso facto* irrelevant to prove pretext and, in a retaliation case, causation.

Such rulings fairly should be addressed by this Court, as they limit evidence unlike in any other cases in the federal courts and whipsaw discrimination plaintiffs in a way never intended by Congress.

In *Ledbetter v. Goodyear Tire and Rubber Company, Inc.*, No. 05-1072 [Petitioner's Brief filed September 7, 2006] the identical issue of limiting evidence of discriminatory intent to the prior 180 (or 300) days is already before this Court.

Thus, the questions presented are:

Whether removal of individual sales accounts and similar petty actions in the workplace that do not have a significant financial or other impact on the employee's status should trigger a requirement of filing with the EEOC each time they occur.

Whether personnel actions older than 300 days which were not adverse employment actions at the time and did not trigger the requirement of reporting to the EEOC may be used to prove discriminatory and retaliatory intent regarding a later employment action that otherwise appears to be neutral on its face.

Whether such personnel actions older than 300 days that were not adverse employment actions and did not trigger the requirement of reporting to the EEOC at the time may be used to prove pretext, and, in a retaliation case, causation.

Whether there is or should be a 300-day statute of limitations on use of evidence showing discriminatory intent, pretext, or, in a retaliation case, causation.

PARTIES TO THE PROCEEDING

There are no parents or subsidiaries known to petitioner.

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Petitioner Linda Haynes ("Haynes") respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals was reported at 456 F.3d 1215 (CA10 2006), and is set forth at App. 1a-27a. The underlying opinion of the district court was not reported and is set forth at App. 28a-50a.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2006. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e)(1), provides in relevant part:

> "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred * * * except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency * * * such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred* * *.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Linda Haynes, a female with birth date of April 6, 1954, had an extensive prior career in communications sales. App. 4a-5a. At her prior company, she had been first in sales for all eight and one-half years of her employment there. She was hired into the respondent corporation ["Level 3"] as an account manager, with an initial title of "carrier sales manager" in the San Francisco office. She began in March 1999. *Id.* Her title was changed to senior account manager August 25, 2000.

In the year 2000, in a gradual process, Haynes' sales accounts at Level 3 were taken away from her and given to a new male employee in his 20s with comparatively lesser experience and skills. App. 4a-5a, 30a. Over time, Haynes complained about this gradual process to her supervisor. The removal of Haynes' sales accounts was chronicled in e-mails and memoranda. *Id.* At the same time, her work was shifted more toward the clerical. Soon the younger male newcomer had ninety accounts to Haynes' twenty or so. App. 31a.

But the removal of Haynes' accounts, one at a time, did not significantly affect her compensation or even her annual performance evaluations. She was consistently promoted at the corporation. She started at $75,000 and was given raises up to $80,000 in base salary, the latest raise on February 3, 2001, which was well after her accounts were removed and given to the young male comparator. The respondent corporation awarded stock

options (OSOs) to employees based upon the company's performance and the employee's performance (employee must be "at or above target" to receive OSOs). Haynes was awarded liberal OSOs and provided with multiple award letters and master award agreements. The very supervisor who was removing Haynes' sales accounts also signed a performance evaluation for her in which he endorsed her own self-rating a 4.5 out of 5 (excellent performer). The manager in charge of all of North America told Haynes, "You're very good; you're exactly what the company wants." The above facts in this paragraph were presented in Haynes' briefing materials, with evidentiary support, and never addressed by either the trial court or the court of appeals. For summary judgment purposes, they had to be taken as true.

In sum, even as sales accounts were being gradually taken away from Haynes, her compensation was not significantly affected and she did not file a formal complaint with the EEOC. She certainly did not file a formal complaint *each time a single sales account was taken away from her*, which is what the Tenth Circuit ruled she had to have done to preserve her rights, as will be discussed *infra*.

But while she did not go to the EEOC as yet, Haynes did not sit idly by. On September 19, 2000, Haynes complained internally that her supervisor favored men and disfavored women, including in the manner in which he removed Haynes' accounts and gave them to the younger male. App. 6a.-7a. Upon hearing Haynes' complaint about her supervisor, the human resources department was contacted by management with a request to speak with Haynes. *Id.* After a period of silence from human resources, Haynes pressed the issue, asking for a

time to speak with human resources. *Id.* She finally got to speak with the human resources representative on November 1, 2000. *Id.* The human resources representative accepted her comments as a complaint pursuant to the company's "open door" policy and said he would conduct an investigation.

However, the human resources department also (and immediately) warned Haynes' chain of command of what she had done, i.e. coming to the human resources department to register a complaint. Within one day, on November 2, 2000, one of Haynes' superiors sent out a threatening e-mail warning that going above his head was forbidden. App. 8a. This e-mail directly violated the corporation's "open door" policy, which expressly permitted such complaints as Haynes had taken to the human resources department. And, of course, complaints of discrimination are protected by the anti-retaliation provision of Title VII.

Nonetheless, the human resources department did not further investigate Haynes' complaint of discrimination. App. 7a.

However, eleven days after her superior's threatening e-mail, on November 13, 2000, Haynes was placed on a performance improvement plan (PIP) by the very supervisor whose discrimination she had recently complained about to the human resources department. App. 8a.

A PIP is a form of discipline. In the PIP, Haynes was criticized for not making certain quotas.

The human resources department helped Haynes' supervisor prepare the PIP to give to her. App. 8a. The human resources representative testified, "[W]e did create a document subsequent to that [her complaint of discrimination] regarding some performance issues that they were having with her in the form of a performance improvement plan."

Then, on June 21, 2001 Haynes was informed that she was laid off, effective three days before. App. 9a.

One of the criteria used by the company to select employees to be laid off was whether the employee was on a PIP. *Id.* The human resources representative testified, "And someone who's on a corrective action for performance [PIP] would be one of those that would be first to be reduced." The human resources representative testified, "That's how she got on the list."

Haynes filed her charge of discrimination with the U.S. Equal Employment Opportunity Commission [EEOC] on October 11, 2001. App. 9a.

B. Proceedings in the District Court

Haynes brought claims of discrimination and retaliation and, after a period of discovery, the respondent corporation filed a motion for summary judgment, which the district court granted in its entirety, dismissing the entire case. App. 9a.

The claims were dismissed notwithstanding the district court's findings that plaintiff was discriminated against in events prior to the end of November 2000 (removal of her sales accounts and placement on the

PIP), and retaliated against (imposition of the PIP on November 14, 2000 for complaining about discrimination to her management and the human resources department). App. 43a. The trial court ruled that, "Once defendant placed plaintiff on the PIP, the PIP automatically resulted in her termination seven months later." *Id.*

In proceeding to dismiss Haynes' claims for Title VII and ADEA discrimination and retaliation, the district court adopted an argument presented by the defense in a footnote, that Haynes' EEOC charge was untimely. App. 39a

The district court ruled that Haynes was required to file her EEOC charge within 300 days of the unlawful employment practice, that her EEOC charge was filed October 11, 2001, that therefore "the basis for plaintiff's claims must have occurred no earlier than December 15, 2000," that Haynes' termination in the layoff was the result of her PIP, but that Haynes' PIP was prior to 300 days before the filing of her EEOC charge. App. 41a-45a.

There was no evidence in this case and no finding by the district court that the respondent corporation made its layoff criteria known to its employees or that Haynes could have been aware that her PIP caused her to be placed at the top of any layoff list, or that Haynes even knew there might be a layoff. No one could have predicted the downturn that caused the layoff, the trial court ruled. App. 17A.

The trial court noted that this fact pattern presented Haynes with a "Catch-22," because certain legal precedent established that written warnings, such as her

PIP, did not constitute an adverse employment action. App. 43a. The district court cited *Rennard v. Woodworker's Supply, Inc.*, No. 03-8031, 2004 WL 1260309, at *10 (CA10 June 9, 2004) (unpublished) [written reprimands without "any immediate or practical effect" on plaintiff's job do not constitute an adverse employment action]; *Taylor v. Small*, 350 F.3d 1286 1293 (CADC 2003) [placement of employee on a PIP that does not affect his grade or salary does not constitute an adverse employment action]. In sum, upon being placed on the PIP, Haynes did not have a basis to file an EEOC charge. *Id.*

The district court went on to rule, however, that there was contrary case law that "each act of discrimination must fall within the 300 day period prior to the employee's EEOC filing or be barred by the statute of limitations." App. 43a-45a. Therefore the district court decided that it was bound to obey Tenth Circuit law as set forth in *Hysten v. Burlington N. & Santa Fe Ry. Co.*, 296 F.3d 1177, 1183 (CA10 2002) [holding that a written reprimand can constitute an adverse employment action], and *Roberts v. Roadway Exp., Inc.*, 149 F.3d 1098, 1104 (CA10 1998) [holding that an employer's written warnings are an adverse employment action if they make it more likely that the employee will be terminated if there are further infractions]. *Id.*

Thus, on mixed legal precedent from the same court of appeals, Haynes' claims of age and sex discrimination were dismissed because her termination was caused solely by her old PIP, about which she had not complained to the EEOC until more than 300 days had passed.

Haynes then appealed to the Court of Appeals for the Tenth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291.

C. Decision of the Court of Appeals

The court of appeals upheld the summary judgment in its entirety, ruling that Haynes' claims relating to the sales accounts that were removed before December 15, 2000 (more than 300 days prior to filing of her EEOC charge) were time-barred. App. 14-15a.

Thus, the court of appeals ruled that each time Haynes' supervisor removed a sales account from her, such conduct constituted an individual adverse action that triggered the running of the clock for Haynes to bring an EEOC charge. App. 15a.

The court of appeals ruled at App. 15a:

> "Because each removal of an account constituted an actionable adverse employment action, Haynes was required to file an administrative charge within 300 days of each removal. She did not do so. Thus, any claim based on the removal of her accounts is time-barred."

The court of appeals elaborated on its new rule, reiterating that each time an account was removed, that constituted a discrete adverse employment action. Because Haynes did not file a complaint of discrimination with the EEOC each time a sale account was removed from her, i.e. each single removal -- and all

of them -- were time-barred and could not support a claim of discrimination. *Id.*

The court of appeals ruled that this result was because Haynes knew that each removal of an account changed her employment status, i.e. contributed to her failure to meet sales quotas, and she knew that said accounts were being given to a younger male. App. 15a.

Paradoxically, the court of appeals then ruled that Haynes' PIP did not constitute an adverse employment action because it did not result in any significant change in her employment status and benefits. App. 15a-18a. However, the court of appeals reiterated that while the removal of sales accounts led to the PIP, which in turn led to the termination, the removal of the sales accounts could not be relied upon to prove the required *discriminatory intent*. Once 300 days had passed, those actions -- the removal of the sales accounts -- were time barred from forming any basis of a complaint of discrimination, including as to proof of intent relating to actions that occurred within the 300-day window. It did not matter that removal of Haynes' sales accounts led to the PIP, which itself was not time-barred since the PIP did not constitute a discrete adverse act against Haynes. App. 16a-23a.

Wrote the court of appeals: Since the removal of sales accounts could not be considered, "the plaintiff's loss of employment was merely an 'inevitable consequence' of an earlier (time-barred) * * * decision, and could not constitute a separately actionable event * * * . App. 20a. In short, the critical datum is the point in time at which the discriminatory act occurred, not the point at which its effects became most injurious* * * . The mere continuity of the employment relationship, in

and of itself, is not enough to prolong the life of a cause of action."

In sum, the court of appeals ruled that evidence of discriminatory intent would be admissible only if that evidence was adducible from acts falling within the 300-day window. Prior acts were irrelevant no matter what intent they proved.

Moreover, the court of appeals ruled that pre-300-day acts by the employer could not be used to prove either pretext or, on a retaliation claim, causation. Once 300 days had passed, such telltale acts were valueless in a federal court as a matter of law, regardless of their *logical* relevance.

REASONS FOR GRANTING THE PETITION

I.

REMOVAL OF INDIVIDUAL SALES ACCOUNTS AND SIMILAR PETTY ACTIONS IN THE WORKPLACE THAT DO NOT HAVE A SIGNIFICANT FINANCIAL OR OTHER IMPACT ON THE EMPLOYEE'S STATUS SHOULD NOT TRIGGER A REQUIREMENT OF FILING WITH THE EEOC EACH TIME THEY OCCUR.

II.

THE COURT OF APPEALS DECISION TO THE CONTRARY WILL CREATE HAVOC IN THE WORK PLACE AND AT THE EEOC.

This petition seeks to overturn a far-reaching decision of the court of appeals that will render the workplace a battle scene of employees versus employers.

The court of appeals decision has creatively declared that, from now on, actions as petty as having a single sales account removed must be complained about in a timely fashion to the EEOC, or they can never thereafter form the basis of a claim of discrimination, either directly or indirectly, or even be used as evidence to prove intent or pretext as to a later adverse action (or in a retaliation case, to prove causation).

In the instant case, Haynes' sales accounts were reduced in number to twenty-something, and her younger male comparator's sales accounts were increased to ninety (via an infusion of Haynes' sales accounts). Thus, Haynes would have been required to file as many as seventy EEOC charges (or amended EEOC charges) in order to preserve her anti-discrimination rights and to demonstrate the pattern against her. Any single sales account removal that she omitted would become a *non est factum* against her employer -- unusable for <u>any</u> purpose in the proof of discrimination and discriminatory intent pursuant to the court of appeals' new ruling.

The application of such legal precedent to American discrimination law is portentous. It will create havoc in the workplace, and it demonstrates a trend in which some federal courts have distanced themselves from the real world of ordinary people. The suggestion -- now a *requirement* within the Tenth Circuit -- that an employee file an EEOC charge at each perceived discriminatory slight in the office -- such as removing a single sales account among ninety sales accounts -- will destroy working relationships, obviate open communications in businesses, and make the day-to-day working world a

series of administrative attacks and counterattacks -- all with the oversight responsibility of the federal government through the auspices of the EEOC.

Example: An elderly waitress in a restaurant notices that her best table (for tips) has been assigned to a young new waiter. And then another table and another over the ensuring year. In order to thereafter be able to cite the pattern against her, the court of appeals decision would have required her to file a separate EEOC charge for the first table removed from her waitressing area, and each one thereafter.

One can envision scores of such examples where an employee would have to immediately go on the offensive with an employer at each petty action, filing a formal charge with the EEOC. All manner of work changes would have to be complained about immediately, or the victim would be forever time-barred from bringing them up again.

The new court of appeals rule is particularly portentous when carried to its logical conclusion. Once the EEOC issues its "right to sue" letter on the first discrimination claim -- relating to a single sales account removed from Haynes' workload -- she would be required to sue within 90 days or be forever barred from doing so. The ensuing litigation would comprise either a series of seventy federal lawsuits (in Haynes' situation) or a series of seventy amended complaints each time another sales account is removed, presuming the trial court would await the series of removals to run its course.

This development in the Tenth Circuit, and elsewhere, as shall be discussed *infra*, is the natural consequence of this Court's abolition of the continuing violation theory. *See, Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). Such decision, now being honed to razor sharpness in the circuit courts, has placed employees in a "damned if you do, damned if you don't" straitjacket that ignores the real world of the American workplace and undermines the remedial purposes of Title VII.

The immediate dilemma for an employee will be whether to file an EEOC charge when a sales account is removed or some other lesser affront occurs, or forever hold one's peace. Of course, to file with the EEOC over such a petty matter *that does not affect one's wallet* in a significant way would *ipso facto* risk an end to one's career at that company. Even the most level-headed observer would wonder why the employee acted so precipitously, instead of trying to work it out with the employer, or merely by keeping one's head down.

Please recall that Haynes' compensation was not significantly affected by the removal of any single sales account or even all of them. She continued to get promotions, raises and stock options (OSOs), not to mention compliments for her performance at various levels of management.

The court of appeals did not quantify a single personal compensation loss that Haynes suffered because of the removal of her sales accounts. The closest it came was noting that Haynes said that someone else was getting paid on her accounts, which means he was getting credit for them. Nonetheless, without any

reference to evidence of actual financial loss, the court of appeals ruled that the removal of Haynes' accounts altered her "status and benefits" *in some unexplained way*. The court of appeals inferred that Haynes "clearly knew the discriminatory nature of [her supervisor's removal of her sales accounts] and the resulting detrimental effect on her income." This reference is unsupported by any citation to financial evidence regarding impact on Haynes' *income*. Apparently a loss of income of one dollar now requires a complaint to the EEOC within the Tenth Circuit.

Thus, the new rule of the court of appeals is that if the employee *should recognize* that the petty action against her today *may* eventually impact her income in a significant way down the road, then the time to complain to the EEOC is now -- or be forever barred.

From common sense and business standpoints, why should Haynes have gone to the EEOC every time a single sales account was removed if there was no immediate and significant impact upon her income?

According to the court of appeals, she should have gone anyway, on pain of never being able to cite such instances in the future.

Congress could not have intended such a result as is embodied in the court of appeals decision.

III.

PERSONNEL ACTIONS OLDER THAN 300 DAYS WHICH WERE NOT ADVERSE EMPLOYMENT ACTIONS AT THE TIME AND DID NOT TRIGGER THE REQUIREMENT OF REPORTING TO THE EEOC MAY BE USED TO PROVE THE DISCRIMINATORY AND RETALIATORY INTENT REGARDING A LATER EMPLOYMENT ACTION THAT OTHERWISE APPEARS TO BE NEUTRAL ON ITS FACE.

IV.

SUCH PERSONNEL ACTIONS OLDER THAN 300 DAYS THAT WERE NOT ADVERSE EMPLOYMENT ACTIONS AND DID NOT TRIGGER THE REQUIREMENT OF REPORTING TO THE EEOC AT THE TIME MAY BE USED TO PROVE PRETEXT, AND, IN A RETALIATION CASE, CAUSATION.

V.

THERE IS NO 300-DAY STATUTE OF LIMITATIONS ON USE OF EVIDENCE SHOWING DISCRIMINATORY INTENT, PRETEXT, OR, IN A RETALIATION CASE, CAUSATION.

Please recall that Haynes was placed on the PIP on November 13, 2000 at a time when no layoffs were anticipated. The court of appeals found that, "* * * no one at Level 3 anticipated the economic downturn that would result in the RIF seven months later." App. 17a. Moreover, the respondent company did not disclose to its employees that in the event of a future layoff, being

on a PIP would place an employee at the top of the layoff list.

Thus, Haynes had no way of knowing that placement on the PIP would *eventually* result in a change in her employment status. The court of appeals adopted that logic. App. 17a. Since the PIP did not present a change in employment status, the court of appeals ruled that the PIP did not trigger a requirement of filing with the EEOC. In so ruling, the court of appeals reversed the district court. The court of appeals ruled at App. 17a:

> "Therefore, her placement on the PIP had no apparent tangible effects other than the requirement she meet her sales quota and a plan to assist her in her efforts. Consequently, Haynes' placement on a PIP was not an adverse employment action."

Paradoxically, the court of the appeals then ruled that placement on the PIP could not be used to prove discriminatory or retaliatory *intent* in a personnel action -- Haynes' selection for layoff -- that occurred more than 300 days later. App. 18a-24a.

Moreover, the court of appeals ruled that such 300-day-old evidence could not be used to establish pretext either. App. 23a.

In sum, the court of appeals established a new statute of limitations for use of evidence of intent and pretext (and, in retaliation cases, causation as well). Such evidence is *ipso facto* obviated and cannot be used for any purpose once 300 days have passed, according to the new rule of the court of appeals.

This is so even if the evidence relates to events that never required filing with the EEOC in the first place because those events did not comprise adverse employment actions at all.

This is also so even if the discrimination victim had no way of knowing that the earlier evidence would lead to adverse actions beyond 300 days down the road.

The court of appeals ruled at App. 23a:

> "These cases instruct, and we agree, that Haynes cannot use [her supervisor's] alleged intent in performing time-barred discrete actions resulting in the PIP, to attach discriminatory intent or pretext to the termination decision based on a neutral policy."

The court of appeals' logic for this ruling was that, at App. 23a,

> "[T]he PIP was an inevitable consequence of the alleged prior adverse employment actions, for which she did not file a timely charge."

Again, this is a new rule banning use of evidence to show discriminatory intent (and pretext, and, in retaliation cases, causation) when that evidence relates to events more than 300 days old -- even if there was no requirement of filing with the EEOC at the time.

Such a new rule of law means that an employer can take actions against an employee that are not so adverse

as to trigger the requirement of filing a charge with the EEOC and then *secretly* use those actions more than 300 days later to put an employee on a list to be terminated. The employee is then forbidden to cite those earlier actions precisely because she did not complain about them to the EEOC at the time. This is so even though the intent to discriminate was kept secret by the employer for 300 or more days.

Note: It was only through discovery that Haynes learned that her placement on the PIP was the reason why she was placed at the top of the layoff list seven months later.

Again, the court of appeals has whipsawed employees and created a new rule of law that requires them to file a claim of discrimination at the EEOC *even when there is no adverse action sufficient to file a claim at the EEOC*. If the employee does not do so -- when she should have guessed about future secret events -- then the evidence is rendered valueless in exactly 300 days, when those future secret events unfold.

Thus, an employee must now be constrained to file a charge of discrimination with the EEOC *even when there is no adverse action to base the charge upon*. The law should not involve such a conundrum. The law should not be a guessing game for employees.

The court of appeals recognized that it was sailing close to uncharted waters, because it wrote in a footnote, at App. 21a, that,

> "We need not and do not express an opinion on the court's determination that an action may

accrue even though no adverse employment action has occurred."

Nonetheless, this is indeed the effect of the court of appeals decision -- and worse. Now once 300 days have passed, not only does the employee lose her fully accrued cause of action, which is appropriate under the statute, but she loses the right to present those prior acts *as evidence of mental state or pretext as to later adverse actions falling within the 300-day window*. Likewise the court of appeals decision erroneously denies a victim of retaliation the use of such evidence older than 300 days to prove causation (which is also what happened in the instant case).

The logical and practical flaws in such a rule of law are self-evident. Pursuant to the court of appeals decision, an employer could *secretly* decide that women can no longer work at the company because of their gender, or Jews because of their religion, or blacks because of their race, and wait 301 days to terminate them without fear of anyone proving discriminatory animus *using the earlier evidence*. Or using that evidence to prove pretext, or, in a retaliation case, causation.

It is one thing to rule that discrete acts more than 300 days older are not fair game for charges of discrimination pursuant to *Morgan, supra*. It is entirely another to rule that such acts can not be used to prove discriminatory animus, pretext, or, in a retaliation case, causation.

This is where certain courts of appeals have carried this Court's decision in *Morgan, supra* -- to a new

extreme. As the court of appeals rationalized in the instant case, at App. 22a,

> "[A]llowance of a claim based solely on a time-barred discrete employment decision would 'undo' *Morgan's* insistence that each discrete act start a new clock."

But the ruling by the court of appeals in the instant case *ipso facto* means that both the *mens rea* and the *actus reus* (together) must have occurred within 300 days, or it is as if the mental intent and the act never occurred in the first place. As the court of appeals ruled, such a happening is "merely an unfortunate event in history which has no present legal consequences * * * ."

The Tenth Circuit is following a line of cases from the First Circuit and the D.C. Circuit, spawned by *Morgan, supra*. In *Law v. Continental Airlines Corp., Inc.*, 399 F.3d 330, 334 (CADC 2005), the court of appeals acknowledged that pursuant to *Morgan, supra*, a prior act "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." However, the court appeals expressed the view that, "The exact scope of this caveat is unclear."

The scope of said evidence and its use in proving discriminatory animus is the very issue embodied herein, and Petitioner seeks a commonsensical decision that such evidence is no less relevant than a threat to murder someone in January that is not carried out until December, more than 300 days later.

It is incongruous to think that Congress intended a limitation on such evidence of discriminatory animus

just because it was more than 300 days old. It also undercuts the use of pretext pursuant to this Court's unanimous decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

Nonetheless, in *Law, supra*, the court of appeals for the D.C. Circuit further discussed the cloudy "caveat" of how such evidence could be used after *Morgan, supra*, and severely limited its use, as follows:

> "Whatever the caveat's precise reach, such background evidence cannot suffice where plaintiffs have offered no evidence of discriminatory purpose other than (at most) [a] discrete time-barred decision * * * ."

See, Jorge v. Rumsfeld, 404 F.3d 556, 563 (CA1 2005) ["'[T]he critical datum is the point in time at which the discriminatory act occurred,' not the point at which its effects became most injurious." *Citing, Morris v. Gov't Dev. Bank*, 27 F.3d 746, 749 (CA1 1994)].

It is these several courts of appeals that are simply declaring as a matter of law that such discrete prior actions are "time-barred" even for use as evidence of discriminatory intent, pretext or, in a retaliation case, causation. The pertinent anti-discrimination statutes say nothing of the sort.

Petitioner herein is not arguing that if she had waited 300 days after her layoff to file with the EEOC, then she should still have been permitted to bring a claim in court. This would cut against the express language of the pertinent anti-discrimination statutes. But Petitioner is arguing that when the *actus reus* occurs within the 300-

day window, then she can pull evidence of discriminatory *mens rea* or animus from any logically relevant period in the employment relationship, no matter how far back in time it might be. Ordinary analyses of relevance should apply, not some artificial, *ad hoc* 300-day cutoff designed to eliminate as many of such cases from the federal court system as possible.

To so artificially limit such evidence, without a legislative mandate, would be as if the court of appeals created a new rule of relevance in all criminal and civil cases that only such evidence of intent that was developed within the last 300 days will be admissible.

This is precisely what the new line of cases is doing, but only in one area of the law -- discrimination/retaliation. The equal protection provision of the Constitution requires that all participants in the federal court system enjoy the same rules of evidence absent some compelling reason to exempt them out or treat them more severely.

F.R.E. 401 defines relevant evidence as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." There is no 300-day "caveat" or limitation. Such a limited evidentiary window does not exist anywhere but in the discrimination law of the First Tenth, and D.C. circuits (and the Eleventh Circuit, as shall be discussed *infra*).

No compelling showing to change the application of the Federal Rules of Evidence has been made herein. Indeed, given the remedial purposes of the anti-

discrimination laws, the opposite is true. All relevant evidence should be admissible, just as in any other case. Indeed, this Court has stated that a court should undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

Other courts of appeals have differed from the First, Tenth and D.C. Circuits and ruled that time-barred actions are relevant to both establish motive and put the timely-filed discrimination claims in context. *See, Carpinteria Valley Farms. Ltd. v. County of Santa Barbara*, 334 F.3d 796, 800 (CA9 2003) ["[T]he district court reached the correct result when it determined that the time-barred acts could not be used to support claims of constitutional violations under 42 U.S.C. § 1983. [Plaintiff] may use these time-barred acts, however, as evidence to establish motive and to put his timely filed claims in context] [*citing RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1062 (9th Cir. 2002)] [emphasis added].

Likewise incidents that the court of appeals labeled as time-barred in the instant case (removal of sales accounts and placement on the PIP) should have been available for use as evidence of the discriminatory motive that resulted in Haynes being laid off at a later time.

Congress never said that the 300-day limit also limited the availability of relevant evidence from outside that window of time. Indeed, this Court has long proceeded on the premise that intentional discrimination gives rise to new violations of the civil rights laws each

time said intent is implemented to cause new injury, regardless of when that intent manifested itself. *See, Bazemore v. Friday*, 478 U.S. 385 (1986). Congress directed "the thrust of the Act to the consequences of employment practices, not simply the motivation." *Griggs v. Duke Power Co.*, 401 U.S. 75, 80 (1998).

VI.

EVIDENCE OF SUCH PERSONNEL ACTIONS OLDER THAN 300 DAYS SHOULD BE ADMISSIBLE TO PROVE DISCRIMINATORY ANIMUS AND PRETEXT PRECISELY BECAUSE IT WAS NOT FORESEEABLE THAT THEY WOULD RESULT SOME DAY IN AN ADVERSE PERSONNEL DECISION; AND THE EMPLOYEE HAD NO REASON TO FILE AN EEOC CHARGE AT THE TIME.

Please recall that the court of appeals ruled herein that at the time Haynes was placed on the PIP no one could have "anticipated the economic downturn that would result in the RIF [reduction in force] seven months later. Further no one could have predicted that Haynes would be unable to meet the PIP * * *."

Thus, there was no reason for Haynes to have identified, highlighted, or complained about the *possibility* that the PIP would become the foundation for an adverse employment action later. This is no different than a company developing a secret reason to terminate someone 300 days before effecting the termination. As a matter of policy, such circumstances should not *ipso facto* cleanse all relevance from the fabric of the actions

that were perpetrated upon the employee more than 300 days before.

Indeed, the court of appeals expressly ruled that Haynes' placement on the PIP did not even comprise an adverse employment action under the law.

Such a finding that there was not even an adverse employment action for the victim to proceed upon at the EEOC undermines the court of appeals' reliance for its new rule of law on an even older case, *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). In the instant case and a more recent one with the same *ratio decidendi*, *Brown v. Unified School District 501*, ___ F.3d ___, (CA10, October 12, 2006), the court of appeals pointed to *United Air Lines, Inc., supra*, for the proposition that a discrete act that was not complained about to the EEOC in a timely fashion can not be cited to support an ensuing claim of discrimination no matter how pertinent as a matter of logical relevance.

However, the court of appeals failed to note that the prior discrete act suffered by the plaintiff in *United Air Lines, Inc., supra* -- a resignation forced by a no-marriage rule -- was on its face an adverse employment action (constructive discharge) that would and should have triggered anyone to go to the EEOC. Thus, it makes good sense to find that the victim should have complained at the time. But such circumstances do not mean that the prior acts should lose their relevance for proof of discriminatory intent as to later acts that are not time-barred.

In the instant case, however, Haynes had no reason to go to the EEOC when she received the PIP, and the court

of appeals implicitly so ruled in determining that no adverse employment action had occurred and thus the clock did not even begin to tick.

Finally, fear of further retaliation is another factor. Haynes had already been retaliated against once, for merely complaining to the human resources department. No one can blame her for not proceeding to the EEOC regarding the PIP, especially when there was no adverse employment action to complain to the EEOC about, as the court of appeals ruled. If a "right to sue" letter had been issued and Haynes had gone into federal court regarding her PIP, her case would have been thrown out because there was no adverse employment action in the first place.

Congress could not have intended its enactments to whipsaw discrimination victims like this.

VII.
MORGAN EXPRESSLY DID NOT RESOLVE THIS ISSUE; THE COURTS OF APPEALS ARE DOING IT ON THEIR OWN, AND ERRONEOUSLY SO, GIVEN THE REMEDIAL PURPOSES OF THE ANTI-DISCRIMINATION LAWS.

This Court in *Morgan, supra*, recognized that the issue of the 300-day window (or 180-day window when resort has not been taken to a state agency first) was not completely resolved in *Morgan*. This Court noted, 536 U.S. at 115, fn. 7:

> "There may be circumstances where it will be difficult to determine when the time period should begin to run. One issue that may arise in such circumstances is whether the time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered. But this case presents no occasion to resolve that issue."

Thus, this Court recognized that the date an injury should have been discovered was a pertinent factor in determining when the 300-day window begins to run. In the instant case, Haynes had no reason to discover her adverse employment action (the layoff) because (a) it had not occurred yet, and (b) it could not have been predicted. That is precisely why the court of appeals determined that placing Haynes on a PIP did not constitute an adverse employment action requiring her to go to the EEOC.

VIII.
THE ISSUE OF A 180-DAY LIMITATION ON EVIDENCE OF DISCRIMINATORY INTENT IS PRESENTLY BEFORE THE COURT IN ANOTHER CASE.

In *Ledbetter v. Goodyear Tire and Rubber Company, Inc.*, No. 05-1072 [Petitioner's Brief filed September 7, 2006] the issue of limiting evidence of discriminatory intent to the prior 180 (or 300) days is squarely before this Court. The issue therein is identical to the *evidentiary* issue in the instant case, and the reasons for granting the instant Petition are equally compelling. In sum, several courts of appeals, including the Eleventh

Circuit in *Ledbetter*, as well as the First, Tenth and D.C. Circuits, have decided to put on blinders and artificially limit such evidence of intent to the past 300 days. This Court is respectfully asked to take those blinders off and deal with relevance and *mens rea* issues in discrimination cases just as in any other cases in the federal courts.

Indeed, the petitioner in *Ledbetter* has presented cogent legal points proving that various courts of appeals are straying far from congressional intent, and the Petitioner herein wishes to fairly adopt those points with credit to the *Ledbetter* litigants, as follows:

--An artificial limit on "how far back in time" relevant evidence may be found conflicts with the basic rationale of *Bazemore, supra.*

--It is not unusual for elements of a claim to arise at different times. Example: price-fixing conspiracies may involve agreements regarding intent years before such intent manifests itself in illegal actions. Nonetheless, such evidence is classically relevant. Another example: Evidence of the intent to evade taxes may pre-date the limitations period and be classically relevant to the mental state needed to convict. *United States v. Carlson*, 235 F.3d 466, 470 (CA9 2000). As the court of appeals ruled in *United States v. Ashdown*, 509 F.2d 793, 798 (CA5 1975), "It would be a bizarre result indeed if a crime properly prosecuted within the limitations period could not be proven because an essential element, such as intent, could only be established by proof of incidents occurring outside the period."

--A statute of limitations does not bar evidence that pre-dates the beginning of the limitations so long as that evidence is "relevant to events during the period." *Fitzgerald v. Henderson*, 251 F.3d 345, 365 (CA2 2001) (citing other cases); 52 Am. Jur. 2d LIMITATION OF ACTIONS § 24 (2006). Any "suggestion that an item of evidence relates to a period that is too remote goes to both the item's relevance and its weight* * *." *Fitzgerald*, at 365.

--In *Reeves, supra*, the Court considered evidence of intent, or lack thereof, going back long before the beginning of the limitations period.

--A contrary rule would have obviated this Court's decision in *Hunter v. Underwood*, 471 U.S. 222, 233 (1985), merely because the action evincing the intent to discriminate was the Alabama Constitution of 1901. Such evidence of intent fell outside the limitations period by more than 70 years, and in such a fact pattern, the First, Tenth, Eleventh and D.C. courts of appeals would have thrown the case out.

--Likewise, such a rule would have obviated *Brown v. Board of Education*, 347 U.S. 483 (1954), because the evidence of discriminatory intent fell outside the limitations period, going back decades.

--If there is a fear that somehow the trial courts will be deluged with stale claims, the doctrines of waiver and laches remain integral parts of the federal legal system. Nothing stopped the respondent corporation in the instant case from asserting defenses of waiver and laches.

--In addition, the traditional analysis of the probative value of evidence versus its unfair prejudice, risk of confusion or delay and cumulative nature is always available to the trial courts. *See*, F.R.E. 403.

There is no need for an artificial 300-day limit on the acquisition of evidence of (a) intent to discriminate, (b) pretext, and (c) in retaliation cases, causation. Pursuant to F.R.E. 402, all relevant evidence is admissible on those issues unless otherwise proscribed by logical irrelevance or express enactments, of which there are none applicable to the instant case. This Court has noted that, "We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." *County of Washington v. Gunther*, 452 U.S. 161, 178 (1981).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 3, 2006

APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

LINDA HAYNES, Plaintiff-Appellant, v. LEVEL 3 COMMUNICATIONS, LLC, Defendant-Appellee.	FILED United States Court of Appeals, Tenth Circuit August 8, 2006 Elisabeth A. Shumaker Clerk of the Court No. 04-1307

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 02-N-1694 (MJW))

Submitted on the briefs:

John R. Olsen of Olsen & Brown, L.L.C., Niwot, Colorado, for Plaintiff-Appellant.

Lisa Hogan, Richard P. Barkley, Meghan W. Martinez of Brownstein Hyatt & Farber, P.C., Denver, Colorado, for Defendant-Appellee.

Before **TACHA,** Chief Judge, **BALDOCK** and **O'BRIEN**, Circuit Judges.

O'BRIEN, Circuit Judge.

Linda Haynes filed suit against her employer, Level 3 Communications (Level 3), following the termination of her employment as part of a reduction in force (RIF). She alleged violations of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213, Title VII of the Civil Rights Act (sex discrimination), 42 U.S.C. § 2000e, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621. She also asserted a breach of contract claim. The district court granted summary judgment in favor of Level 3, concluding Haynes failed to timely file her ADA, Title VII and ADEA claims and declined to exercise supplemental jurisdiction over her breach of contract claim. We exercise jurisdiction under 28 U.S.C. § 1291 and AFFIRM.

Standard of Review

"We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court." *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1182 (10th Cir. 2003) (quotation omitted). Summary judgment is appropriate if the evidence presented by the parties demonstrates "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). An issue of fact is "genuine" if the evidence allows a reasonable jury to resolve the issue either way and is "material" when "it is essential to the proper disposition of the claim." *Bennett v. Quark, Inc.*, 258 F.3d 1220, 1224 (10th Cir. 2001).

"The party moving for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Id.* (citations omitted). If the movant does not bear the burden of persuasion at trial, it "may make its prima facie demonstration simply by pointing out to the court a lack of evidence for the nonmovant on an essential element of the nonmovant's claim." *Id.* (citations omitted). If the moving party properly supports its motion for summary judgment, "the burden shifts to the nonmoving party to go beyond the pleadings and set forth specific facts from which a reasonable jury could find in favor of the nonmoving party." *Id.* At all times, the record, and all reasonable inferences drawn from it, are considered in the light most favorable to the party opposing the motion. *Id.*

With these standards in mind, we set forth the facts in the light most favorable to Haynes.

Background

After eight and a half years as a top sales person at her former employer IXC, Haynes followed her boss, David Weigand, to work at Level 3 in March 1999. Her title was "carrier sales manager" in the San Francisco office.[1] Initially, she worked directly for Weigand, but following his promotion, Paul Larson became her supervisor. At various times during Haynes' tenure at Level 3, Larson also supervised two other saleswomen, Mary Vargo and Cari Burich (located in the Los Angeles office), and two salesmen, Steve Stone and Shane Quivey.

Shortly after Larson became the carrier products unit supervisor, he began to recruit Quivey, a thirty-one-year-old male working in the internet products unit. When Quivey came to work in the carrier products unit, Larson treated Quivey and Stone with a marked preference compared with the saleswomen.[2] Haynes alleges Quivey acted inappropriately and did not follow

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[1] During the relevant time period, Level 3 was divided into three product sales groups — carrier, corporate and internet.

[2] Unfortunately, the exact dates of many of the allegations are not in the record. It appears Larson became Haynes' supervisor in June or July 1999 and Quivey joined the carrier products unit in August or September 1999.

company procedures, yet Larson protected him. Haynes also observed that Larson was gradually taking customer accounts away from Vargo and giving them to Quivey. As a result, Vargo was unable to meet her sales quota. Vargo complained about the situation to Larson and Wiegand, pursuant to Level 3's "open door policy."[3] Shortly thereafter, Larson gave Vargo a poor performance evaluation and placed her on a "performance [improvement] plan (PIP)." (R. Vol. III at 413.) In February 2000, Vargo resigned.

While these events were taking place, Larson also began taking accounts away from Haynes and giving them to Quivey. Although Quivey was to give some of his accounts to Haynes in trade, he never did. Haynes claims Quivey also received favored treatment in the form of assignments to the best leads and better pricing for his clients.

Beginning in early 2000, Haynes' health began to decline. Sometime in May 2000, Larson demanded she come to work against her doctor's advice, only to have her attend a meeting at which she was directed to give Quivey one of her most lucrative accounts. According to Haynes, this was a "watershed" moment. Haynes confronted Larson and accused him of discriminating against her on the basis of her age and sex. As Haynes testified, "I realized that it was going to be a turning point, that [Larson] knew that I knew what he was

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[3] Level 3 had a written "open door policy" whereby any employee could speak about any topic without fear of retaliation.

doing." (R. Vol. III at 239.) Thereafter, Larson began to criticize Haynes to customers and management, harming her relationships with her customers and Mike Lanza, Larson's direct supervisor. On May 18 or 19, 2000, Haynes complained to Lanza that Larson was discriminating against her by giving the benefits of her work to someone else.

Eventually, due to Larson's alleged discriminatory management, Haynes was unable to meet her sales quota. Larson informally counseled Haynes several times regarding her sales performance throughout 2000. By August 2000, Haynes met only a small percentage of her sales quota.[4] In early to mid-September, Larson met with Haynes and again informally counseled her on her performance.

On September 18, 2000, Haynes e-mailed Scott Roberts, Senior Vice-President of Sales and Marketing, and asked to exercise the open door policy.[5] In the e-mail, Haynes complained of Larson's management style and his failure to support her. On September 19, 2000, Haynes sent a second e-mail to Roberts explaining her position regarding Larson's lack of management skills in more detail and requesting help in resolving the

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[4] While Level 3 contends she met only seven percent of her sales quota, Haynes disputes this number, alleging the actual percentage was approximately thirteen.

[5] Haynes testified she had spoken to Roberts frequently regarding Larson's treatment of older women prior to the September e-mail.

problem. She complained Larson's lack of support caused customers to get angry with her and, in turn, caused Larson to reassign her accounts to Quivey. She also alleged Larson had been unavailable to help close deals, fell asleep during customer calls and had told her not to discuss her problems with upper management. Several e-mails indicate Haynes continued to ask Roberts to assist her in receiving support and it appears Roberts responded appropriately.

On October 3, 2000, Larson issued Haynes a formal, written warning noting she had reached only fifty percent of her year-to-date quota. On October 24, 2000, Roberts e-mailed Haynes to inform her he had asked Randy Hester, Director of Human Resources, to contact her regarding her request for an open door meeting. On October 26, 2000, Haynes responded with another request for a meeting. On November 1, 2000, Haynes and Hester talked via telephone. In preparation for the meeting, Haynes forwarded the September 19, 2000 e-mail she had sent to Roberts detailing her complaints. Following the two-hour call, Hester telephoned Lanza and Larson to find out why Haynes' accounts had been moved. He was told some accounts were moved by upper management and others at the request of the customers. Hester did not investigate further.[6]

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[6] Level 3 vehemently disputes many of the facts alleged by Haynes. Roberts and Hester testified they were never aware that Haynes was complaining about sexual discrimination, rather they understood it as a complaint about her manager not giving her support and taking away her accounts. Haynes

The next day, Lanza sent an e-mail to his staff, including Larson. The e-mail stated in relevant part:

> [N]o one is to take ANY issue to my superiors without first bringing it to my attention. I want to be very clear about this. Nothing goes over my head unless I have been made aware of it and AGREE that it should be escalated. If there is a part of this message that is unclear call me and I will be happy to clear up any confusion. I want a response back from each of you stating you have read this and understand it.

(Vol. III at 361.) Larson forwarded Lanza's message to Haynes, Burich and Quivey with his own admonishment, "Please make sure everything goes through Mike and I before it goes any higher." (*Id.*)

Eleven days later, on November 13, 2000, Larson placed Haynes on a PIP he devised with Hester's assistance. The PIP listed five objectives, including a requirement that Haynes "[m]eet or exceed 100% of [her] monthly sales quota . . . for December '00 and January '01." (R. Vol. III at 363.) It also stated, "[i]t is crucial you understand how important your required improvement is, since continued unsatisfactory sales performance will result in further disciplinary action."

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insists she told them both that the discrimination was based on her age and sex and informed them two other women had also been victims of such discrimination.

(Vol. III at 363.) Finally, the PIP informed Haynes if she discussed its terms and conditions with any other Level 3 employees, she was subject to immediate termination.

Nine days after Haynes was placed on the PIP, her physician informed Level 3 she was placing Haynes on a two week medical disability for consultation with specialists. Five days later, Haynes took a medical leave of absence. The first twelve weeks of leave were taken pursuant to the Family Medical Leave Act. After that time, Haynes took indefinite leave under Level 3's medical leave policy. She received short-term disability payments from Level 3's third-party insurance carrier through February 26, 2001. However, the third-party insurance carrier denied her request for long-term disability payments. It is undisputed Level 3 had no control or influence over this decision.

Haynes remained on medical leave until Level 3 terminated her employment on June 18, 2001, as part of a RIF. Larson and Lanza's employment, among others, was also terminated in the same RIF. Roberts made the decisions as to which employees would be terminated. One of the criteria for termination under the RIF was an employee's placement on a PIP.

Haynes filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on October 11, 2001. At her request, the EEOC issued a Notice of Right to Sue letter on June 27, 2002. On September 4, 2002, Haynes filed this action against Level 3 alleging she was terminated in violation of the

ADA, Title VII and the ADEA. She also asserted a breach of contract claim. Following discovery, Level 3 moved for summary judgment on all of Haynes' claims. After supplemental briefing, the district court granted summary judgment in favor of Level 3. In so doing, it construed Haynes' complaint as incorporating two separate bases for her claims — her termination and her placement on the PIP. The district court denied relief, concluding: (1) the termination of Haynes' employment was not discriminatory because it was premised on her status under the PIP and it is uncontested that all employees under a PIP were placed on the list to be considered for the RIF, (2) the last action prior to the RIF was placing her on a PIP, (3) the PIP was an adverse employment action, (4) but it, and all other alleged discriminatory acts, were outside of the required 300-day time period for filing an administrative claim. After disposing of Haynes' federal claims, the district court declined to exercise supplemental jurisdiction over her breach of contract claim.[7] This appeal followed.

Discussion

All three of Haynes' causes of action, Title VII, ADEA and ADA, require that she file a timely administrative claim within 300 days of the challenged discriminatory action. Haynes filed her EEOC charge on October 11, 2001. Therefore, the discriminatory actions on which she bases her claims must have occurred on or after December 15, 2000. 42 U.S.C. §§

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[7] On appeal, Haynes does not challenge the district court's refusal to exercise supplemental jurisdiction.

12117(a); 2000e-5; *Duncan v. Manager, Dep't. of Safety, City & County of Denver*, 397 F.3d 1300, 1308 (10th Cir. 2005) (Title VII); *Davidson*, 337 F.3d at 1183 (ADA); *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1174 (10th Cir. 1998) (ADEA). Generally, a cause of action accrues "on the date the employee is notified of an adverse employment decision by the employer." *Davidson*, 337 F.3d at 1187. However, not every perceived indignity will rise to the level of an adverse employment action triggering the 300-day limitations period. A "mere inconvenience or alteration of job responsibilities" will not do. *Dick v. Phone Directories Co., Inc.*, 397 F.3d 1256, 1268 (10th Cir. 2005) (quotation omitted). Only "acts that constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits" will rise to the level of an adverse employment action. *Id.* (quotation omitted). Nonetheless, "we liberally interpret" whether an adverse employment action exists "and take a case-by-case approach, examining the unique factors relevant to the situation at hand." *Id.* (quotation omitted.)

We begin by identifying the allegations that constitute an adverse employment action because such "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new [300-day] clock for filing charges alleging that act." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002).

> The very precision of this requirement — not a year, not six months, not the state law statute of limitations for comparable causes of action — bespeaks Congress's concern. Title VII is not intended to allow employees to dredge up old grievances; they must promptly report and take action on discriminatory acts when they occur. Unlitigated bygones are bygones.

Duncan, 397 F.3d at 1308.

The crux of Haynes' argument on appeal is that the district court erred in concluding the PIP was an adverse employment action that occurred outside the time limitation. She maintains the only adverse employment action triggering the 300-day statutory limitations period occurred on the date of her termination. In any event, Haynes argues that under *Morgan*, even if the PIP is an adverse employment action, her allegations surrounding the PIP and all other previous discriminatory actions are relevant as a backdrop for the ultimate determination as to whether the termination of her employment was discriminatory and the RIF merely a pretext.[8]

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[8] Haynes raises numerous arguments on appeal that were not presented to the district court. A significant portion of her Opening Brief and Reply Brief is directed to her claim that her PIP was limited to a two-month period (*i.e.*, until January 2001). She reasons that, because the PIP was limited to two months, she was subject to additional adverse employment

Haynes is correct that the statute does not "bar an employee from using prior acts as background evidence in support of a *timely* claim." *Morgan,* 536 U.S. at 113 (emphasis added). Nonetheless,

> such background evidence cannot suffice [to establish a timely claim] where [there is] no evidence of discriminatory purpose other

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actions by (1) either being placed on a new PIP after January 2001, (2) extending the time frame for the PIP without her knowledge or (3) being terminated when she was not actually on a PIP. Haynes also insists the district court erroneously characterized the PIP as automatically causing her termination. She now insists it was only one reason she was included in the RIF. None of these arguments were raised below. Indeed, Haynes' theory below was simply and repeatedly based on a simple sequence of events:

> In sum, plaintiff was laid off because she was put at the top of the layoff list Which, in turn, was because she had been placed on a corrective action plan, which, in turn, was because she complained to human resources about discrimination and mistreatment under the 'open door' policy.

(R. Vol. II at 193). While Haynes' new theories may seem more attractive at this stage of the proceedings, we will not consider them on appeal. *Davidson*, 337 F.3d 1179, 1188 (10th Cir. 2003); *Gorman v. Carpenters' & Millwrights' Health Benefit Trust*, 410 F.3d 1194, 1202 (10th Cir. 2005).

> than (at most) [a] discrete time-barred decision.... To decide otherwise would completely undo *Morgan*'s insistence that each discrete discriminatory act starts a new clock for filing charges alleging that act.

Law v. Continental Airlines, Corp., Inc., 399 F.3d 330, 334 (D.C. Cir. 2005). Therefore, as our first step, we will examine Level 3's discriminatory acts as alleged by Haynes prior to her termination to determine whether any constitute time-barred discrete adverse employment actions.

A. Discriminatory Acts Prior to Placement on the PIP

Haynes' allegations of Larson's actions prior to placement on the PIP may be parsed into three categories: (1) a request to come to work while ill; (2) lack of managerial support as compared with that provided to the male employees; and (3) reassignment of her accounts. As to the first two categories, we agree with Haynes that they are not the type of actions that would begin the statutory limitations period since she has not alleged, and the record does not reflect, these actions were anything but an inconvenience.

Larson's repeated removal of Haynes' accounts, however, paint a different picture. As Haynes repeatedly stated, these actions directly caused a significant change in her employment status and benefits. According to Haynes, Larson's discriminatory actions caused Quivey to receive the rewards of her

work and, conversely, she was unable to meet her sales quotas. Although she did not identify the precise accounts unfairly removed, the dates they were transferred to Quivey or the amount of income she lost as a result of the transfers, Haynes clearly knew the discriminatory nature of Larson's actions and the resulting detrimental effect to her income.[9] Indeed, in a November 7, 2000 e-mail to Larson, Haynes stated, "this has impacted my sales output tremendously, as the work I've done is not reflected in my base and someone else is now getting paid on much of my work." (R. Vol. III at 333.) Because each removal of an account constituted an actionable adverse employment action, Haynes was required to file an administrative charge within 300 days of each removal. She did not do so. Thus, any claim based on the removal of her accounts is time-barred.

B. Placement on the PIP

In essence, the district court concluded Haynes' placement on a PIP was *per se* an adverse employment action because it constituted a disciplinary action in the form of a written warning. Most courts that have

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[9] The record includes several e-mails dated August 13, 2000, November 7, 2000, and September 17, 2000, in which Haynes' complains of the transfer of her accounts to Quivey. In addition, Haynes' also testified that the removal of an account in May, 2000 was a "watershed" moment. Therefore, while it is not clear exactly when her accounts were transferred, the record indicates such transfers began, at the latest, in May 2000 and ceased in November, 2000.

considered whether a PIP, standing alone, is an adverse employment action have found it is not. *Givens v. Cingular Wireless*, 396 F.3d 998, 998 (8th Cir. 2005) ("[P]lacing [an employee] on a 'performance improvement plan,' without more, did not constitute an adverse employment action."); *Taylor v. Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003) ("[F]ormal criticism or poor performance evaluations are not necessarily adverse actions and they should not be considered such if they did not affect the employee's grade or salary."); *Agnew v. BASF Corp.*, 286 F.3d 307, 310 (6th Cir. 2002) (the possibility of termination mentioned in the plaintiff's PIP "was contingent on future developments, rather than being a present plan or decision" and therefore did not constitute an adverse employment action supporting a constructive discharge claim.).

Although the district court recognized the existence of this non-binding precedent, it determined the Tenth Circuit had reached the opposite conclusion. Relying on *Hysten v. Burlington N. & Santa Fe Railway Company*, 296 F.3d 1177, 1183 (10th Cir. 2002), and *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1104 (10th Cir. 1998), it held "[Haynes] could have filed a charge of discrimination immediately after being placed on the PIP because a written warning in the Tenth Circuit constitutes an adverse employment action." (R. Vol. IV at 61.) We disagree with the district court's interpretation of our precedent and expressly join our sister circuits in holding a PIP, standing alone, is not an adverse employment action.

A written warning *may* be an adverse

employment action only if it effects a significant change in the plaintiff's employment status. For example, in *Roberts*, the defendant had peppered plaintiff's file with "twenty warning letters," and the record demonstrated "that the more warnings an employee received, the more likely he or she was to be terminated for a further infraction." 149 F.3d at 1104.[10] Thus, the effect on the plaintiff's employment status was an immediate placement in an at-risk status. The facts in this case do not demonstrate that Haynes' placement on the PIP in November had any immediate effect on her employment status. She was not demoted, her pay did not change and her responsibilities were not significantly modified. Instead, she was presented with clear goals to achieve her continued employment.

She also concedes no one at Level 3 anticipated the economic downturn that would result in the RIF seven months later. Further, no one could have predicted that Haynes would be unable to meet the PIP due to her subsequent unforeseen medical leave. Therefore, her placement on the PIP had no apparent tangible effects other than the requirement she meet her sales quota and a plan to assist her in her efforts. Consequently, Haynes' placement on a PIP was not an adverse employment action. *See Dick*, 397 F.3d at 1270

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[10] The facts in *Hysten* are not as clear. It appears the plaintiff's retaliation claim relied on a written Level 1 reprimand issued approximately two weeks after he filed a discrimination suit. The effect of the reprimand is not, however, set forth in the opinion. We can assume the record indicated an immediate adverse consequence as a result.

(holding a "single write-up is not an adverse employment action.").

C. Discriminatory Discharge

There is no question that Haynes' termination from Level 3 is an adverse employment action that occurred within the 300-day statutory time period. However, the district court determined Haynes failed to present evidence of a discriminatory intent,[11] *i.e.*, that her inclusion in the RIF was based on her age, disability or

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[11] To prevail on a claim of age discrimination in the RIF context, a claimant must show: "(1) the claimant is within the protected age group; (2) he or she was doing satisfactory work; (3) the claimant was discharged despite the adequacy of his or her work; and (4) there is some evidence the employer intended to discriminate against the claimant in reaching its RIF decision." *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1137 (10th Cir. 2000). "Under the ADA, a plaintiff must show (1) that he is disabled within the meaning of the ADA; (2) that he is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) that he was discriminated against because of his disability." *Davidson*, 373 F.3d at 1188 (quotations omitted). To prevail on a claim alleging termination under Title VII, the plaintiff "must first establish a prima facie case, demonstrating that: (1) he was a member of a protected class; (2) he was qualified and satisfactorily performing his job; and (3) he was terminated under circumstances giving rise to an inference of discrimination." *Salguero v. City of Clovis*, 366 F.3d 1168, 1175 (10th Cir. 2004).

sex, respectively, because her termination was pursuant to a neutral policy. We agree.

In *United Air Lines, Inc. v. Evans*, Evans, a flight attendant, was forced to resign in 1968 due to United's policy of prohibiting married flight attendants. 431 U.S. 553, 554 (1997). In 1971, United's policy was found to be unlawful. *Id.* In 1972, Evans was rehired but was denied seniority credit for her past service. *Id.* at 554. She filed suit alleging the discriminatory policy forcing her to resign was the direct cause of her inability receive the benefits attendant to her seniority in her current position. *Id.* The question before the Court was whether her failure to file a charge within 90 days of her 1968 separation caused her claim to be time barred and foreclosed Title VII relief. *Id.* at 556.

Evans argued, *inter alia*, that "the seniority system [gave] present effect to the past illegal [policy] and therefore perpetuate[d] the consequences of forbidden discrimination." *Id.* at 557. The Court rejected this argument because the policy to refuse seniority to rehired employees applied equally to those who had terminated their employment because of discriminatory and non-discriminatory practices, notwithstanding their sex. *Id.* at 558. The Court recognized "the seniority system [gave] present effect to a past act of discrimination." *Id.* Nonetheless, "United was entitled to treat that past act as lawful" when Evans failed to file a timely charge of discrimination. *Id.* The Court explained that the past act "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately

considered, it is merely an unfortunate event in history which has no present legal consequences." *Id.* Because the present (timely) employment decision was "neutral in its operation," the past discriminatory policy could not be the basis of her claim. *Id.*; *see also Delaware State College v. Ricks,* 449 U.S. 250, 258 (1980) (Plaintiff neither alleged nor proved "that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure.").

Similarly, in *Jorge v. Rumsfeld*, the plaintiff, Jorge, was employed by the Army and Air Force Exchange Services in the commissary program for military personnel. 404 F.3d 556, 559 (1st Cir. 2005). In 1979, she became the retail manager of a Base store, Toyland, and remained there for almost twenty years. At the age of fifty-one, she elected to make a lateral transfer to another store on the Base, where she was a model employee until 1998. However, the assignment of a new supervisor caused Jorge to complain about the supervisor's practices, to which the supervisor allegedly responded with derogatory comments about her age. While Jorge was on vacation, the supervisor unilaterally transferred her back to Toyland, filled her position with a younger, less experienced male and did not offer an explanation upon her return. *Id.* Jorge refused to report to Toyland, using all her leave and sick time resisting the transfer. *Id.* at 560. Eventually, she was given the option of either reporting to Toyland or taking early retirement. She submitted a notice of involuntary early retirement and filed suit alleging constructive discharge

in violation of the ADEA and Title VII. *Id.*

The court determined Jorge's claim accrued at the time she was transferred, not at her resignation, even though her transfer was not an adverse employment action.[12] *Id.* at 562. The court reasoned:

> Jorge's troubles evidently stemmed from the sequence of events exemplifying the harassing behavior of her new supervisor. That sequence of events began in 1998 and culminated in the order transferring her to Toyland. Jorge refused to accept that transfer, even though it entailed no loss of pay, benefits, status, or the like . . . . By all accounts, it was the refusal to report for work and the passage of time that led to [the] ultimatum, and Jorge does not suggest that this action was anything other than standard operating procedure.

Id. "Absent such an allegation, the plaintiff's loss of employment was merely an 'inevitable consequence' of the earlier (time-barred) . . . decision, and could not constitute a separately actionable event." *Id.* at 563. (*quoting Ricks*, 449 U.S. at 257-58). "In short, the critical datum is the point in time at which the

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[12] We need not and do not express an opinion on the court's determination that an action may accrue even though no adverse employment action has occurred.

discriminatory act occurred, not the point at which its effects became most injurious . . . . The mere continuity of the employment relationship, in and of itself, is not enough to prolong the life of a cause of action." *Id.* (quotation omitted).[13]

Again, in *Law*, employees claimed a discriminatory failure to promote occurring outside the appropriate time limitations was the cause of their lower pay checks, each a discrete discriminatory action. 399 F.3d at 332-33. The court rejected the claim because the determination of the amount of the paychecks was made pursuant to a neutral policy. *Id.* at 333. While the court recognized the earlier failure to promote could be used as background under *Morgan*, it concluded the allowance of a claim based solely on a time-barred discrete employment decision would "undo" *Morgan's* insistence that each discrete act start a new clock. *Id.* at

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[13] The Supreme Court has noted, "[t]here may be circumstances where it will be difficult to determine when the time period should begin to run. One issue that may arise in such circumstances is whether the time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered." *Morgan,* 536 U.S. at 114 n.7. In exceptional circumstances, "the 300-day period of limitations for filing a charge with the EEOC may be adjusted by equitable doctrines such as waiver, estoppel and equitable tolling." *Davidson*, 337 F.3d at 1188. Haynes wisely did not raise equitable tolling before the district court or on appeal. The record reveals she clearly believed Larson's actions were discriminatory as early as May 2000, well over a year before she brought her claims.

334.

These cases instruct, and we agree, that Haynes cannot use Larson's alleged intent in performing time-barred discrete actions resulting in the PIP,[14] to attach discriminatory intent or pretext to the termination decision based on a neutral policy. Haynes has failed to allege any discriminatory act on or after December 15, 2000.[15] She does not claim that a PIP was outside

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[14] Haynes argues that, because the PIP was not an adverse employment action, she had no opportunity to bring a claim until her claim ripened at the time of her termination in June. As discussed above, Haynes could have brought he claim as early as May 2000 and as late as 300 days from November 2000. We note Haynes concedes that, at the time she was placed on the PIP, she had failed to make her sales quotas, but places the cause for her poor performance solely upon Larson's previous discrete acts of discrimination. Thus, her allegations only underscore the fact that the PIP was an inevitable consequence of the alleged prior adverse employment actions, for which she did not file a timely charge. *See Ricks*, 449 U.S. at 257-58 ("It appears that termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure.").

[15] In her opening brief, Haynes alleges five discrete adverse employment actions (other than being placed on the PIP) occurring within the time limitations. First, she alleges the PIP was extended or Level 3 imposed a new PIP. These arguments were not presented to the district court. Therefore, we will not consider them here. Second, she contends she was fired while on approved sick leave. While it is true Level 3's policy does not allow someone to be terminated *because*

standard operating procedure to address a failure to meet her sales quota. Neither has she alleged that Level 3 did not even-handedly include all employees currently on a PIP in the RIF. Finally, Haynes presented no evidence that any other employees on a PIP were spared in the RIF. As a result, she fails to demonstrate any timely inference of discrimination in her inclusion in the RIF. Accordingly, we affirm summary judgment in favor of Level 3 on her claims of unlawful discharge.[16]

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he or she is on sick leave, Level 3 consistently stated Haynes was terminated during the RIF because of the PIP, a fact admitted by Haynes. Haynes' third allegation centers on the failure to approve long-term medical leave. However, it is uncontested that Level 3 was not involved in this decision. Haynes' fourth and fifth alleged adverse employment acts are her placement on the list to be included in the RIF and her termination. As stated above, Haynes fails to show these acts to be discriminatory, as all employees in her situation were treated similarly.

[16] Given our determination that summary judgment is appropriate on this basis, we need not address whether the district court erred in determining Haynes was not "disabled" under the ADA or whether she waived this issue on appeal.

D. Retaliation

Haynes also claims her inclusion in the RIF was in retaliation for her complaints of discrimination under Level 3's open-door policy. To succeed on a claim of retaliation a plaintiff must show: "(1) that he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action." *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 2006 WL 1806605 at *7 (10th Cir. 2006) (10th Cir. 2006) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006)) (footnote omitted). Here, Haynes' meeting with Hester occurred on November, 1, 2000. She was placed on the performance improvement plan on November 13, 2000 and terminated June, 2001, over seven months later.

"A causal connection may be shown by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001) (quotation omitted). Standing alone, temporal proximity between the protected activity and the retaliatory conduct must be very close in time. Otherwise, "the plaintiff must offer additional evidence to establish causation." *Id.* A seven-month period between protected activity and adverse action will not, by itself, establish causation. *See Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999) ("[A] three-month period, standing alone, is insufficient to establish causation.").

Haynes argues the temporal proximity is sufficient here because Level 3 could not "immediately" terminate her while she was on medical leave, and therefore, "[t]he company's opportunity to camouflage plaintiff's termination within an innocent-looking RIF did not present itself until a RIF was scheduled." (Appellant's Br. at 33.) Such speculative argument is not only insufficient, it defies logic.

Assuming Larson's decision to place Haynes on the PIP was because she had spoken out, such assumption does not establish an inference that Larson's motive carried over to Roberts' decision, seven months later, to include her in the RIF. "An employer's refusal to undo a discriminatory decision is not a fresh act of discrimination." *Croy v. Cobe Labs, Inc.*, 345 F.3d 1199, 1203 (10th Cir. 2003) (quotation omitted); *see Stepney v. Naperville Sch. Dist. 203*, 392 F.3d 236, 240 (7th Cir. 2004); *Stewart v. Booker T. Washington, Ins.*, 232 F.3d 844, 853 (11th Cir. 2000); *Lever v. Northwestern Univ.*, 979 F.2d 552, 556 (7th Cir.1992). Indeed, the facts indicate no causal connection between Larson's alleged retaliatory decision and Roberts' neutral application of policy.

Haynes admits that, at the time Larson acted, neither he nor anyone else at Level 3 anticipated the future RIF or was aware the PIP would expose Haynes to collateral vulnerability regarding her employment. (Appellant's Br. at 20.) (She concedes "[N]ot even the manager who placed plaintiff on the original PIP could predict that it was a precursor to plaintiff's

termination.") Two weeks later, Haynes left work on medical leave. Haynes' assertion that her medical leave prevented her immediate termination is refuted by the fact she was on medical leave at the time she was included in the RIF. Haynes does not dispute Level 3's policy whereby persons under a corrective action plan were chosen to be placed on the list for inclusion in the RIF. Haynes does not aver there were employees exempted from this policy or that some employees under a corrective action plan were not fired. In short, Haynes has not shown any connection between Larson's motivation placing Haynes on the PIP and Level 3's decision to include all employees on a corrective action plan as primary candidates and their ultimate inclusion in the RIF. *See Manning v. Chevron Chemical Co., LLC.*, 332 F.3d 874, 884 (5th Cir. 2003) (applying a general policy to an employee is not retaliation), *cert. denied*, 540 U.S. 1107 (2004). Thus, she has failed to establish the causation element of her retaliation claim.

Conclusion

In sum, to the extent Haynes' claims rely on her discharge, she fails to establish the discriminatory intent necessary for a prima facie case. To the extent Haynes' claims are based on Larson's actions, her claims are untimely. Accordingly, we AFFIRM summary judgment in favor of Level 3.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

Civil Action No.
02-N-1694

LINDA HAYNES,

Plaintiff,

v.

LEVEL 3
COMMUNICATIONS,
LLC,

Defendant.

FILED
United States District Court
Denver, Colorado
July 27, 2004
Gregory C. Langham
Clerk

ORDER AND MEMORANDUM OF DECISION

This is an employment discrimination case. Plaintiff Linda Haynes alleges that her employer, Defendant Level 3 Communications. LLC, discriminated against her in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C.A. §§ 12101-213 (West 1995 & Supp. 2004), Title VII, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1995 & Supp. 2004), and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A. §§ 621-34 (West 1999 & Supp.

2004). She also claims that Level 3 breached her employment contract. This matter is before the court on "Defendant's Motion For Summary Judgment," filed May 5, 2003, and "Defendant's Uncontested Motion to Submit Supplemental Declarations in Support of Reply Brief," filed July 16, 2003. Jurisdiction is based upon 28 U.S.C.A. § 1331 (West 1993 & Supp. 2003).

FACTS

1. Factual Background

Prior to working for defendant, plaintiff worked in sales at IXC Communications where she excelled in her job. (Pl.'s Opp'n to Def.'s Mot. for Summ. J., Statement of Additional Facts ¶ 2 [filed June 16, 2003] [hereinafter "Pl.'s Resp."]; *admitted in pertinent part at* Reply in Supp. of Mot. for Summ. J., Resp. to Additional Facts ¶ 2 [filed July 15, 2003] [hereinafter "Def.'s Reply"].) When her boss at IXC Communications transferred to work for defendant, plaintiff also switched jobs to work for defendant. (Pl.'s Resp., Statement of Additional Facts ¶ 3; *admitted in pertinent part* at Def.'s Reply, Resp. to Additional Facts ¶ 3.) Thus, plaintiff began working for defendant in early 1999 as a sales manager. (Mem. Br. in Supp. of Mot. for Summ. J., Statement of Undisputed Facts ¶ 1 [filed May 5, 2003] [hereinafter "Def.'s Br."]; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 1; Pl.'s Resp., Statement of Additional Facts ¶ 4; *admitted in pertinent part at* Def.'s Reply. Resp. to Additional Facts ¶ 4.)

Defendant has an "open door" policy that permits an employee to complain internally. (Pl.'s Resp., Statement of Additional Facts ¶¶ 4-5 *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶¶ 4-5.) This policy provides that defendant "will not tolerate retaliation or

unequal treatment directed at employee-owners who utilize this Open Door Policy to raise workplace problems." (Def.'s Br., Ex. A-8 [Open Door Policy].) According to plaintiff, this open door policy was one of the reasons why she wanted to work for defendant. (Pl.'s Resp., Statement of Additional Facts ¶¶ 4, 7; *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶¶ 4, 7.)

Plaintiff's boss at defendant's San Francisco office was Paul Larson, who also managed Shane Quivey. (Def.'s Br., Statement of Undisputed Facts ¶¶ 3-4; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶¶ 3-4.) Quivey is a male, who at the relevant time period was in his twenties. (Pl.'s Resp., Statement of Additional Facts ¶ 35; *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶ 35.) The parties vigorously dispute (1) whether he was qualified for his position in sales, and (2) whether he performed his sales job well. *(Id.,* Statement of Additional Facts ¶¶ 9-11; *denied at* Def.'s Reply, Resp. to Additional Facts ¶¶ 9-11; Pl.'s Resp., Ex 37 [Vargo Aff.].) According to plaintiff's deposition testimony, Quivey would come in late to meetings, argue inappropriately with customers, give incorrect information to customers, show up to meetings hung over, not keep consistent work hours, and not wear the proper attire. *(Id.,* Statement of Additional Facts ¶ 9; *denied at* Def.'s Reply, Resp. to Additional Facts ¶ 9.)[1] Defendant adamantly denies plaintiff's allegations

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[1] Plaintiff also alleges that Quivey viewed pornography at work and would scream at people in the office. (Pl.'s Resp., Statement of Additional Facts ¶ 9; *denied at* Def.'s Reply. Resp. to Additional Facts ¶ 9; Pl.'s Resp., Ex. 1 at 38 [Pl.'s Depo. Tr.].) Plaintiff sets forth this averment based upon the statements of other employees of defendant who worked with Quivey. (Pl.'s Resp., Ex. 1 at 38 [Pl.'s Depo. Tr.].) Plaintiff's testimony as to this point is hearsay. "[T]he court may consider only admissible evidence when ruling on a summary judgment motion." *Nobody*

regarding Quivey and provides numerous affidavits that conflict with plaintiff's allegations. (Def.'s Reply, Resp. to Additional Facts ¶ 9.)

Plaintiff alleges, and defendant disputes, that Larson also gave plaintiff's better accounts to Quivey and gave Quivey favorable treatment with regards to the accounts. (Pl.'s Resp., Statement of Additional Facts ¶ 16; *denied at* Def.'s Reply. Resp. to Additional Facts ¶ 16.) Although the timing is unclear, Larson reduced plaintiff's accounts so Quivey had ninety accounts to plaintiff's twenty or twenty-five. *(Id.* Statement of Additional Facts ¶ 25; *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶ 25.) According to plaintiff, defendant was also reducing the accounts of another female employee. Plaintiff and her fellow employee Mary Vargo claim that Larson discriminated against Vargo in favor of Quivey, handing Vargo's accounts over to Quivey. *(Id.,* Statement of Additional Facts ¶¶ 12-13; *denied at* Def.'s Reply, Resp. to Additional Facts ¶¶ 12-13.) According to plaintiff and Vargo, but disputed by defendant, when Vargo complained to Larson's superiors, he retaliated against her. *(Id.,* Statement of Additional Facts ¶ 14; *denied at* Def.'s Reply, Resp. to Additional Facts ¶ 14).

As a general matter, plaintiff testified in her deposition that Larson treated men and women differently, giving men all of the business advantages and repeatedly discriminating against women. *(Id.,* Statement of Additional

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in Particular Presents, Inc. v. Clear Channel Communications, Inc., — F. Supp.2d —, 2004 WL 725464, at *43 (D. Colo 2004). These hearsay statements do not fall under the party-opponent exception because plaintiff has not shown that the declarants were authorized by defendant "to engage in the type of correspondence at issue," *Id.* I therefore do not consider these averments.

Facts ¶¶ 26-28, 62; *denied in pertinent part at* Def's Reply, Resp. to Additional Facts ¶¶ 26-28, 62.) For example, Larson would cover up men's mistakes, set higher standards for women, lie about women's performance, bad mouth women to the customers, and give better leads to the men. *(Id.)* Defendant disputes these claims. (Def.'s Reply, Resp. to Additional Facts ¶¶ 26-28.)

On August 13, 2000, plaintiff sent an electronic mail message to Larson regarding her concerns about how Larson was giving Quivey her lucrative accounts. (Pl.'s Resp., Statement of Additional Facts ¶ 8; *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶ 8; Pl.'s Resp., Ex. 10 [8/13/00 electronic mail message from plaintiff to Larson].) Also, according to plaintiff, she orally complained to Larson that he 'vas discriminating against her because she was a woman and because she was older. *(Id.,* Statement of Additional Facts ¶ 63; *denied at* Def.'s Reply, Resp. to Additional Facts ¶ 63.) The record does not provide the temporal context of this alleged oral complaint. *(Id.,* Statement of Additional Facts ¶ 63; *denied at* Def.'s Reply, Resp. to Additional Facts ¶ 63; Pl.'s Resp., Ex. 1 at 104 [plaintiff's depo.].)

In response to the aforementioned issues, on September 18, 2000, plaintiff wrote an electronic mail message complaining about Larson's management style to defendant's senior vice president of sales, Scott Roberts, who was two management levels above Larson. (Def.'s Br., Statement of Undisputed Facts ¶¶ 9, 29; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶¶ 9, 29; Pl.'s Resp., Statement of Additional Facts ¶ 22; *admitted at* Def.'s Reply, Resp. to Additional Facts ¶ 22.) Plaintiff wrote this electronic mail message under defendant's open door policy, and Roberts believed this complaint fell within the scope of the policy. *(Id.,* Statement of Undisputed Facts ¶¶ 9, 11-12,

37-38; *admitted in pertinent part at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶¶ 9. 11-12, 37-38.) Roberts contacted defendant's director of human resources, Randall Hester, about plaintiff's complaint and requested that he contact plaintiff. (Pl.'s Resp., Statement of Additional Facts ¶ 30; *admitted at* Def.'s Reply, Resp. to Additional Facts ¶ 30.) The following day plaintiff wrote a more detailed electronic mail message to Roberts about her issues with Larson and her critiques of his handling of his job. (Def.'s Br., Statement of Undisputed Facts ¶ 10; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 10; Pl.'s Resp., Statement of Additional Facts ¶ 23; *admitted at* Def.'s Reply, Resp. to Additional Facts ¶23.) This electronic mail message alleged, *inter alia,* that Larson showed "favoritism" towards Quivey. *(Id.,* Statement of Undisputed Facts ¶ 10; *admitted in pertinent part at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 10.) According to plaintiff's testimony, and disputed by Roberts, plaintiff told Roberts that Larson favored men over women and worked to hurt his women employees. (Pl.'s Resp., Statement of Additional Facts ¶ 25; *denied at* Def.'s Reply, Resp. to Additional Facts ¶ 25.) She also told him that Larson discriminated on the basis of age. (*Id.*, Statement of Additional Facts ¶ 25; *denied at* Def.'s Reply, Resp. to Additional Facts ¶ 25.)

On October 3, 2000, Larson told plaintiff that her sales performance was poor and that she needed to improve immediately. (Def.'s Br., Statement of Undisputed Facts ¶ 5; *admitted in pertinent part* at Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 5.) Then, on October 24, 2000, Roberts replied to plaintiff regarding her September I8, 2000 complaint and told her that he had asked Hester to get involved. (Pl.'s Resp., Statement of Additional Facts ¶ 31; *admitted at* Def.'s Reply, Resp. to Additional Facts ¶ 31.) Plaintiff spoke with Hester on November 1, 2000. *(Id.,* Statement of Additional Facts ¶ 32; *admitted at* Del's Reply,

Resp. to Additional Facts ¶32.) Plaintiff claims that she told Hester in this meeting that Larson was discriminating against her because she was a woman and because she was older. *(Id.,* Statement of Additional Facts ¶ 33; *denied at* Def.'s Reply, Resp. to Additional Facts ¶ 33.) Conversely, Hester claims that the issue of gender and age discrimination never arose, and plaintiff merely complained about Larson's poor management style. *(Id)* Hester did consider plaintiff's complaints to fall within the purview of defendant's open door policy. *(Id.,* Statement of Additional Facts ¶ 36; *admitted at* Def.'s Reply, Resp. to Additional Facts ¶ 36.)

Hester, thereafter, contacted Mike Lanza, Larson's supervisor, and Larson to discuss plaintiff's complaints. (Def's Br., Statement of Undisputed Facts ¶ 28; *admitted in pertinent part at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 28; Pl.'s Resp., Statement of Additional Facts ¶ 39; *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶ 39.) The following day, Lanza and Larson sent out electronic mail messages to their sales group, including plaintiff, explaining that "no one is to take ANY issue to [Lanza's] superiors without first bringing it to [Lanza's] attention." (Pl.'s Resp., Statement of Additional Facts ¶40; *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶ 40; Pl.'s Resp., Ex. 24 [11/02/00 electronic mail message from Haynes to Larson with electronic mail history].) According to plaintiff, this electronic mail message was in response to her discussion with Hester, which is demonstrated by the temporal proximity between her discussion with Hester and the electronic mail message. *(Id.,* Statement of Additional Facts ¶ 40; *denied in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶ 40) Defendant, on the other hand, contends that this electronic mail message was in response to plaintiff's actions earlier that day of discussing a client meeting with Roberts without contacting either Larson or

Lanza first. (Def.'s Reply, Resp. to Additional Facts ¶ 40, Ex. A-23 [11/02/00 electronic mail message from Haynes to Larson with electronic mail history].)

On November 7, 2000, plaintiff sent another electronic mail message to Larson regarding her concerns about how Larson was giving Quivey her lucrative accounts. (Pl.'s Resp., Statement of Additional Facts ¶ 8; *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶ 8; Pl.'s Resp., Ex. 11 [11/7/00 electronic mail message from plaintiff to Larson].) Plaintiff claimed in her deposition that by around this time, she only had three viable accounts. *(Id.,* Statement of Additional Facts ¶ 21; *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶ 21.)

On November 13, 2000. Larson placed plaintiff on a performance improvement plan (hereinafter "PIP"), which Larson and Hester drafted. (Def.'s Br., Statement of Undisputed Facts ¶ 6; *admitted in pertinent part at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 6; Pl.'s Resp., Statement of Additional Facts ¶¶ 44, 60; *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶¶ 44, 60.) The parties agree that the PIP was a form of discipline. (Pl.'s Resp., Statement of Additional Facts ¶ 48; *admitted at* Def.'s Reply, Resp. to Additional Facts ¶ 48.) The PIP required that plaintiff meet or exceed 100% of her monthly sales quota in the following two months and meet other objective criteria to increase her sales. (Def.'s Br., Statement of Undisputed Facts ¶ 7; *admitted* at Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 7.) The parties dispute whether plaintiff's performance was poor enough to necessitate defendant placing her on the PIP. (Pl.'s Resp., Statement of Additional Facts ¶ 50; *denied at* Def.'s Reply, Resp. to Additional Facts ¶ 50.) Plaintiff contends that her performance was excellent, but Larson's numerous improper actions led her to have bad sales numbers. *(Id.,* Statement of

Additional Facts ¶ 50; *denied at* Def.'s Reply, Resp. to Additional Facts ¶ 50.) Defendant contends that plaintiff was underperforming because of her own faults. *(Id.)*

According to plaintiff, she developed an anxiety disorder and aggravation of her colitis[2] in 2000, and these conditions rose to the level of a disability. (Def.'s Br., Statement of Undisputed Facts ¶ 13; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 13; Pl.'s Resp., Statement of Additional Facts ¶ 72; *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶ 72.) On November 22, 2000, plaintiff's primary care physician recommended that plaintiff go on a two week medical disability leave while she consulted with specialists who could determine how long her recuperation would take. (*Id.*, Statement of Undisputed Facts ¶ 16; *admitted in pertinent part at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 16.) Thus, starting in late November 2000, plaintiff began a medical leave of absence from defendant. *(Id.,* Statement of Undisputed Facts ¶ 17; *admitted in pertinent part at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 17.) Plaintiff's leave of absence continued far longer than two weeks. Plaintiff took twelve weeks of leave under the Family Medical Leave Act and then took an indefinite leave under defendant's medical leave policy. *(Id.,* Statement of Undisputed Facts ¶ 18; *admitted in pertinent part at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 18.)

Plaintiff reports that she was disabled from late November 2000 until well after defendant terminated her employment, discussed below. *(Id.,* Statement of Undisputed Facts ¶ 32; *admitted at* Pl.'s Resp., Resp. to

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[2] Colitis is an inflammation of the colon. Merriam-Webster's Medical Dictionary (2004).

Statement of Undisputed Facts ¶ 32.) Specifically, she claims that during this time she couldn't leave her house and just "stayed under the covers up to her neck," while her mother took care of her. *(Id.,* Statement of Undisputed Facts ¶ 32; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 32.) Her primary care physician told plaintiff that she could not work during this period of time. *(Id.,* Statement of Undisputed Facts ¶ 33; *admitted in pertinent part at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 33.) According to plaintiff, there was nothing defendant could have done (i.e. modify her work schedule or make other accommodations) to enable her to return to work. *(Id.,* Statement of Undisputed Facts ¶ 15; *admitted in pertinent part at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 15.)

In June, 2001 defendant underwent one of several Reductions in Force (hereinafter "RIF"). *(Id.,* Statement of Undisputed Facts ¶ 24; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 24.) Defendant developed a list of criteria that would trigger an employee's selection for the RIF, which included an employee's placement on a PIP. *(Id.,* Statement of Undisputed Facts ¶¶ 25-26; *(admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶¶ 25-26; Pl.'s Resp., Statement of Additional Facts ¶ 65; *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶ 65.) When Larson placed plaintiff on the PIP, he was unaware that (1) there would be an RIF in June 2001, and (2) placement on a PIP would be a criteria for being selected for the lay-offs. *(Id.,* Statement of Undisputed Facts ¶ 27; *admitted in pertinent part at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 27.) Hester, however, was aware that a PIP was one of defendant's main criteria in determining who to lay off during an RIF. (Pl.'s Resp., Statement of Additional Facts ¶¶ 65-66; *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶¶

65-66.) On June 21, 2000, defendant laid off plaintiff, Larson, and Lanza as part of defendant's RIF. (Def.'s Br., Statement of Undisputed Facts ¶ 28; *admitted in pertinent part at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 28; Pl.'s Resp., Statement of Additional Facts ¶ 71; *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶ 71.) Roberts was ultimately responsible for the decision to lay off plaintiff, Larson, and Lanza. *(Id.,* Statement of Undisputed Facts ¶ 29; *admitted in pertinent part* at Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 29.) Plaintiff was forty-six years old when defendant terminated her employment. (Pl.'s Resp., Statement of Additional Facts ¶ 1; *admitted* at Def.'s Reply, Resp. to Additional Facts ¶ 1.) Defendant did not lay off Quivey. *(Id.,* Statement of Additional Facts ¶ 35; *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶ 35.)

2. Procedural History

On October 11, 2001, plaintiff filed a charge of discrimination with the EEOC. (Def.'s Br., Statement of Undisputed Facts ¶ 36; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 36.) The EEOC issued a right to sue letter on June 27, 2002. (Compl., Ex. 1 [Notice of Right to Sue] [filed Sept. 4, 2002].)

Plaintiff filed her original complaint in this court on September 4, 2002. (Compl.) Plaintiff amended her complaint on February 24, 2003. (Am. Compl. [filed Feb. 4, 2004].) Plaintiff sets forth four claims for relief in her amended complaint. First, she alleges that defendant violated the ADA by its discriminatory acts (Am. Compl. ¶ 41.) Second, she alleges that defendant violated Title VII by its discriminatory and retaliatory acts. *(Id.* ¶ 42.) Third, she alleges that defendant violated the ADEA through its discriminatory and retaliatory acts. *(Id.* ¶ 43.) Fourth, she

alleges that defendant breached its contracts with plaintiff. *(Id.* ¶ 44.)

Defendant moved for summary judgment on all of plaintiff's claims on May 5, 2003. (Def.'s Mot. for Summ. J. [filed May 5, 2003].) In a footnote, defendant argues that plaintiffs claims are time barred for failure to file an EEOC complaint within 300 days from the date of the allegedly unlawful employment practice. (Def.'s Br. at 10 n. 1.) Neither plaintiff's response nor defendant's reply address this issue. Since this issue is dispositive, I gave the parties an opportunity to argue this specific issue at a hearing on July 16, 2004. (Courtroom Mins. [dated July 16, 2004].) On July 19, 2004, regarding a sub-issue discussed at the hearing, plaintiff filed a supplement citing cases where courts found that an employee's placement on a PIP did not constitute an adverse employment action. (Pl.'s Supplemental Auth. in Opp'n to Def.'s Mot. for Summ. J. [filed July 19, 2004] [hereinafter "Pl.'s Supplement"].)

ANALYSIS

1. Standard of Review

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, the court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the . . . moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (2003); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986); *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 513, 1517 (10th Cir. 1994). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477

U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Concrete Works, Inc.*, 36 F.3d at 1518 (citing *Celotex Corp.*, 477 U.S. at 325, 106 S. Ct. at 2554). The nonmoving party may not rest solely on the allegations in the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324, 106 S. Ct. at 2553; *see* Fed. R. Civ. P. 56(e). "'Only disputes over facts that might affect the outcome of the suit under governing law will preclude the entry of summary judgment.'" *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 531 (10th Cir. 1998) (quoting *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2505). The court may consider only admissible evidence when ruling on a summary judgment motion. *See World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir. 1985). The factual record must be viewed in the light most favorable to the nonmoving party. *Concrete Works, Inc.*, 36 F.3d at 1518 (citing *Applied Genetics Int'l, Inc.* v. *First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 [10th Cir. 1990]).

2. *Plaintiff's ADA claim*

Plaintiff's ADA claim fails for two reasons. The first reason is set forth in this section and the second reason is set forth in the following section with regards to plaintiff's Title VII and ADEA claims. Defendant contends that plaintiff's first claim for relief, violation of the ADA, must be dismissed because plaintiff cannot establish that she was (1) disabled under the ADA or (2) qualified under the ADA. (Def.'s Br. at 8-10.) Since I resolve this issue regarding the latter argument, I do not address the former.

To establish a prima facie case under the ADA, plaintiff must demonstrate "(1) that he is 'disabled' within

the meaning of the ADA; (2) that he is qualified -- with or without reasonable accommodation; and (3) that he was discriminated against because of his disability." *Aldrich v. Boeing Co.*, 146 F.3d 1265, 1269 (10th Cir. 1998) (quoting *Siemon v. AT&T Corp.*, 117 F.3d 1173, 1175 [10th Cir. 1997]). A person is qualified if she can "with or without reasonable accommodation, [] perform the essential functions of the employment position that [she] holds or desires." 42 U.S.C.A. § 12111(8) (West 1995 & Supp. 2003). The relevant time for determining whether the plaintiff is a qualified individual with a disability under the ADA is at the time of discharge. *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 380 (6th Cir. 1998). Here, plaintiff concedes that she could not work at all when she was terminated. (Def.'s Br., Statement of Undisputed Facts ¶¶ 15, 32-33; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Facts 15, 32-33.) Accordingly, plaintiff was not a qualified individual under the ADA. 42 U.S.C.A. § 12111(8); *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1225 (11th Cir. 1997) (holding that employee was not "otherwise qualified" as required to establish prima facie case under ADA because he conceded that he was unable to return to work in any capacity and required indefinite medical leave when he was terminated). Plaintiff, therefore, cannot establish a prima facie case under the ADA and her first claim for relief fails.

3. Plaintiff's Title VII and ADEA Claims

Plaintiff's Title VII and ADEA claims likewise fail, but for a different reason. Defendant contends, in a footnote, that plaintiff's claims are time barred for failure to file an EEOC complaint within 300 days from the date of the allegedly unlawful employment practice. (Def.'s Br. at 10 n. 1.) A plaintiff must file a complaint with the EEOC within 300 days from the date of the unlawful employment practice

in order to avoid summary judgment. *Croy v. Cobe Labs., Inc.*, 345 F.3d 1199, 1202 (10th Cir. 2003); *Herrera v. Int'l Bhd. of Elec. Workers Union*, 228 F. Supp.2d 1233, 1240 (D. Colo. 2002). Here, plaintiff filed a charge of discrimination with the EEOC on October 11, 2001. (Def.'s Br., Statement of Undisputed Facts ¶ 36; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶ 36.) Thus, the basis for plaintiff's claims must have occurred no earlier than December 15, 2000.

As of December 15, 2000, plaintiff was on medical leave from defendant, but had not been terminated as part of the RIF. (Def.'s Br., Statement of Undisputed Facts ¶¶ 17, 28; *admitted in pertinent part at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶¶ 17, 28; Pl.'s Resp., Statement of Additional Facts ¶ 71; *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts ¶ 71.) Plaintiff's termination as part of the RIF was not discriminatory or retaliatory, in and of itself, rather it was a result of, *inter alia*,. plaintiff's PIP disciplinary action. *(Id.*, Statement of Undisputed Facts ¶¶ 25-26; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶¶ 25-26; Pl.'s Resp., Statement of Additional Facts ¶ 65; *admitted in pertinent part at* Def.'s Reply, Resp. to Additional Facts, 65.) Plaintiff alleges numerous discriminatory and retaliatory actions taken by defendant, including the PIP, all of which occurred prior to defendant's medical leave of absence that began in November 2000. (Pl.'s Resp., Statement of Additional Facts ¶¶ 12-13, 16, 26-28, 32, 40, 44, 60, 62; *admitted in part, denied in part at* Def.'s Reply, Resp. to Additional Facts ¶¶ 12-13, 16, 26-28, 32, 40, 44, 60, 62.) As plaintiff explains, "plaintiff was laid off because she was put at the top of the layoff list which, in turn, was because she had been placed on a corrective action plan, which, in turn, was because she complained to human resources about discrimination and mistreatment under the

'open door' policy." *(Id.,* Statement of Additional Facts ¶ 68; *denied at* Def.'s Reply, Resp. to Additional Facts ¶ 68.) The facts, taken in a light most favorable to plaintiff, show that plaintiff suffered (1) discriminatory acts up through November 2000, and (2) an act in retaliation for protected opposition in the form of the PIP on November 14, 2000. Once defendant placed plaintiff on the PIP, the PIP automatically resulted in her termination seven months later. (Def.'s Br., Statement of Undisputed Facts ¶¶ 25-26; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Facts ¶¶ 25-26; Pl.'s Resp., Statement of Additional Facts ¶¶ 65-68; *admitted in part, denied in part at* Def.'s Reply, Resp. to Additional Facts ¶¶ 65-68.) The question, therefore, is whether plaintiff's selection for the RIF within the limitations period can bring in her claims for discriminatory and retaliatory acts, all of which occurred outside of the limitations period.

This question, at first glance, presents a Catch-22 for plaintiff. One line of cases, as set forth in plaintiff's supplemental authority, finds that an employer's written warnings to an employee do not constitute an adverse employment action. (Pl.'s Supplement at 1-2 [citing *Rennard v. Woodworker's Supply, Inc.,* No. 03-8031, 2004 WL 1260309, at *10 (10th Cir. June 9, 2004) (unpublished); *Taylor Small,* 350 F.3d 1286, 1293 (D.C. Cir. 2003)].) Accordingly, under these cases plaintiff did not have the basis, as of the time that she was placed on the PIP, to file an EEOC complaint.

However, in a different set of cases, courts have concluded that each act of discrimination must fall within the 300 day period prior to the employee's EEOC filing or be barred by the statute of limitations. This circuit used to follow a rule permitting suit on "claims of discrimination alleging incidents [] occurr[ing] outside the time limitations

. . . if the various acts constitute[d] a continuing pattern of discrimination." *Croy*, 345 F.3d at 1202. This rule was modified by the United States Supreme Court in *National Railroad Passenger Corp. v. Morgan*. *Id.* (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061 [2002]).[3] *Morgan* held, with regards to Title VII claims of discrimination, that "since discrete acts [of discrimination] are easily identifiable and individually actionable, acts that occur[] outside of the limitations period, even though related to those occurring within the period, are not actionable." *Id.* *Morgan's* reasoning applies with equal force to ADA and ADEA cases. *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1184 (10th Cir. 2003) (holding that *Morgan* applies to ADA cases); *Sharpe v. Cureton*, 319 F.3d 259, 268 n. 6 (6th Cir. 2003) (holding that *Morgan* applies to ADEA cases). The "proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." *Del. State Coll. v. Ricks*, 449 U.S. 250, 258, 101 S.Ct. 498, 504 (1980) (emphasis removed) (quoting *Abramson v. Univ. of Haw.*, 594 F.2d 202, 209 [9th Cir. 1979]). Moreover, "[a]n employer's refusal to undo a discriminatory decision is not a fresh act of discrimination." *Croy*, 345 F.3d at 1203 (alteration in original) (quoting *Lever v. Northwestern Univ.*, 979 F.2d 552, 556 [7th Cir. 1992]). Here, assuming that the first line of cases is correct, then plaintiff finds herself in the Catch-22, for her placement on the PIP is not an adverse employment action sufficient to set forth a complaint with the EEOC, but it is a discriminatory act that begins the clock running on her requirement to file

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[3] Defendant cites to *Martin v. Nannie and the Newborns, Inc.* in its footnote regarding the continuing pattern of discrimination rule. (Def.'s Br. at 10 n. 1 [citing *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410 (10th Cir. 1993)].) *Martin* was abrogated by *Morgan*.

with the EEOC.

Fortunately, I do not need to resolve this conflict. Although plaintiff notes several non-binding authorities that state that written warnings do not constitute an adverse employment action, the only binding authorities to address this issue have reached the opposite conclusion. *See Hysten v. Burlington N. & Santa Fe Ry. Co.*, 296 F.3d 1177, 1183 (10th Cir. 2002) (holding that a written reprimand can constitute an adverse employment action); *Roberts v. Roadway Exp.*, Inc., 149 F.3d 1098, 1104 (10th Cir. 1998) (holding that employer's written warnings to an employee, which make it more likely that the employee will be terminated for further infractions, constitutes an adverse employment action); *see also Woolery v. Brady*, 741 F. Supp. 667, 669 (E.D. Mich. 1990) ("the obligation to challenge a performance appraisal that is allegedly discriminatory arises at the time that the evaluation is issued to the employee, and a discrimination complaint is untimely if the allegation is later raised outside the limitations period upon the evaluation's use in a promotion proceeding"); *but see Rennard*, 2004 WL 1260309, at *10 (holding that written reprimands without "any immediate or practical effect" on plaintiff's job do not constitute an adverse employment action); *Taylor*, 350 F.3d at 1293 (defendant's placement of plaintiff on a PIP that did not affect plaintiff's grade or salary was not an adverse employment action). Therefore, plaintiff could have filed a charge of discrimination immediately after being placed on the PIP because a written warning in the Tenth Circuit constitutes an adverse employment action. Plaintiff did not file with the EEOC within 300 days of the alleged discriminatory actions, and plaintiff therefore did not timely file her complaints of discrimination and retaliation with the EEOC. Because of her untimely filing, her ADA, ADEA, and Title VII claims are barred.

*4. **Plaintiff's Contract and Promissory Estoppel Claim***

Plaintiffs fourth claim for relief is for breach of contract and promissory estoppel premised upon state law. (Am. Compl. ¶¶ 4, 44.) This court has jurisdiction over the ADA, ADEA, and Title VII claims under 28 U.S.C.A. § 1331, federal question jurisdiction. Plaintiff does not assert diversity jurisdiction as a basis for her fourth claim for relief. The record before this court does not reveal whether the parties are diverse, or if the amount in controversy is greater than $75,000. My only jurisdiction over plaintiff's state law claim, therefore, is supplemental jurisdiction pursuant to 28 U.S.C.A. § 1367(a) (West 1993 & Supp. 2003).

Since the three claims under federal law have been dismissed, and these claims provided the sole basis for this court's original jurisdiction, I decline to exercise supplemental jurisdiction over plaintiff's fourth claim and dismiss it without prejudice to refiling in state court. 28 U.S.C.A. § 1367(c)(3) ("[t]he district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction"); *United Mine Workers of Am. V. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139 (U.S. 1966) ("if the federal claims are dismissed before trial . . . the state claims should be dismissed as well").

5. Conclusions

Based on the foregoing it is therefore

ORDERED as follows:

1. Defendant's Uncontested Motion to Submit

Supplemental Declarations in Support of Reply Brief (# 49) is GRANTED.

2. Defendant's motion for summary judgment (# 36) is GRANTED.

3. The clerk shall forthwith enter final judgment in favor of defendants and against plaintiff, dismissing all of plaintiff's federal claims with prejudice and dismissing the state law claim without prejudice, for lack of subject matter jurisdiction. Defendants may recover their costs by filing a bill of costs within eleven days of today's date.

Dated this 27 day of July, 2004.

BY THE COURT:

EDWARD W. NOTTINGHAM
United States District Judge

EOD
UNITED STATES DISTRICT COURT
DENVER, COLORADO
JUL 27 2004
GREGORY C. LANGHAM
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

Civil Action No. 02-N-1694 LINDA HAYNES, Plaintiff, v. LEVEL 3 COMMUNICATIONS, LLC, Defendant.	FILED United States District Court Denver, Colorado July 29, 2004 Gregory C. Langham Clerk

FINAL JUDGMENT

In accordance with orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a)(1), the following FINAL JUDGMENT is hereby entered.

1. Pursuant to the written Order and Memorandum of Decision filed by Judge Edward W. Nottingham on July 27, 2004:

a. Defendant's motion for summary

judgment (#36) is GRANTED.

b. Judgment is entered in favor of defendant Level 3 Communications, LLC and against plaintiff Linda Haynes; all of plaintiff's federal claims are dismissed with prejudice and plaintiff's state law claim is dismissed without prejudice for lack of subject matter jurisdiction.

2. Defendant may recover its costs by filing a bill of costs within eleven days of the date of the filing of the court's Order and Memorandum of Decision.

Dated this 29 day of July, 2004.

APPROVED BY THE COURT:

EDWARD W. NOTTINGHAM
United States District Judge

ENTERED FOR THE COURT:
GREGORY C. LANGHAM, CLERK

By Stephen P. Ehrlich
Chief Deputy Clerk

EOD
UNITED STATES DISTRICT COURT
DENVER, COLORADO
JUL 29 2004
GREGORY C. LANGHAM
CLERK